

Indigent Legal Services Task Force Meeting (HB 1064)

Third Meeting

June 20, 2023

1-5 p.m. CDT

Best Western Plus Ramkota Hotel, Sioux Falls, SD, and virtual via www.sd.net

PRESENT:

Co-Chair Dean Neil Fulton, USD Knudson School of Law
Co-Chair Circuit Court Judge Michael Day
Randy Brown, Hughes County Commission
Thomas Cogley, Attorney
Brent Kempema, Assistant Attorney General
Circuit Court Judge Christina Klinger
Wendy Kloeppner, Lake County State's Attorney
Sen. Jim Mehlhaff
Rep. Will Mortenson
Traci Smith, Minnehaha County Public Defender's Office
Lori Stanford, Attorney
Eric Whitcher, Pennington County Public Defender's Office

TASK FORCE STAFF:

Greg Sattizahn, State Court Administrator
Aaron Olson, UJS Director of Budget and Finance
Jeff Tronvold, UJS Legal Counsel

NOT PRESENT:

Arthur Hopkins, Oglala Lakota County Commission

CALL TO ORDER:

Dean Fulton stated there is a quorum to call the meeting to order.

LISTENING SESSION RECAP

- People are overall happy with the quality of the lawyers being appointed to cases.
- Availability is the most pressing concern.
- Some communities feel like they have a structure that works well for them (local flexibility is important to them).
- Tried to stay away from only discussing funding, but it came up frequently.
- Rural lawyers needing to be connected to support services was brought up. Attorneys would be more willing to work in these areas if they had more support, training and mentorship.
- South Dakota compared to other states—statewide structure could look like having appeals and habeas corpus cases handled by a state office of sorts (mature arguments on the defense side and unify voices).

- A lot of uncertainty about what the system could or should look like; don't want it to become political in any way.
- Could be under one umbrella or general with local flexibility.
- Collection of court-appointed attorney's fees came up frequently.
- Current compensation rate is too low, and \$1 per mile is especially too low.

Wendy Kloeppner: Counties that have a system that works generally want to keep it and be able to control it locally. If there is a state office, then it may freeze out local attorneys who want to do this work.

Judge Day: Lawyers are wondering if they are going to get court appointments anymore.

Traci Smith: Discussion of defendants having a buy in; findings are needed as to whether they have the ability to pay. It is the state's obligation to provide a lawyer if someone can't afford one. For defendants that don't have the ability to pay, repayment is difficult in light of the scope of the "attorney's fees." Sometimes, having a private attorney would have been less than the attorney's fees indigent defendants are asked to repay.

Eric Whitcher: There is only so much that can be imposed to chase down the money. It could be done better by sorting it out at the application level. Some defendants are going to be able to pay and some just can't.

Wendy Kloeppner: How do you collect outside of the county and off supervision?

Dean Fulton: Problems and strengths are very local; there will not be one solution.

Greg Sattizahn (regarding the survey results about how much training an attorney completes each year): No specifics about kinds of training; there is no overarching training.

Wendy Kloeppner (regarding survey results about how defendants qualify for a court-appointed attorney): I have seen judges say, "You've filled out a court-appointed attorney form three months ago, has anything changed?" That could be the informal process judges are indicating.

Greg Sattizahn (regarding the survey results about upfront attorney's fee payments): Upfront payment from the defendant used to be a thing that was done but not anymore.

Brent Kempema: I have seen upfront payment once within the last five years.

Traci Smith (regarding survey results about how long it takes to appoint an attorney to a case): I am happy to see attorneys are being appointed quickly.

DISCUSSION ABOUT OTHER STATE SYSTEMS

Sen. Jim Mehlhaff: Funding is an issue in other state-based systems. Don't see a state that has figured out what to do when they are over capacity (Montana example).

Judge Day and Dean Fulton: When there aren't enough attorneys, it is tough to handle those situations.

Brent Kempema: If we are going to move toward centralization, we must avoid politicization.

Wendy Kloeppner: Agreed we need the right people who are knowledgeable and who care about this. Prosecutors want good public defense attorneys.

Brent Kempema: Overwhelmed attorneys make state's attorneys' jobs tougher. Likes Idaho's system with a centralized appellate division.

Wendy Kloeppner: Also, a centralized appellate division would help with the overwhelm. Maybe that is the solution?

Eric Witcher: With appeals, you don't know what you are going to get.

Traci Smith: Do state's attorneys have the option to send cases to the Attorney General's office when overwhelmed?

Brent Kempema: Yes, some automatically go to the Attorney General's Office, and they take over bigger cases as well.

Traci Smith: Minnehaha County Public Defender's Office only has one attorney who handles appeals, so that wouldn't provide much relief. Also, public defense offices can't get grants.

Dean Fulton: Should look to the Federal Criminal Justice Act for some guidance in this area.

Lori Stanford: Likes Montana and Wyoming's systems. Agrees that you need to have the right people. Legal problems are just a small portion of defendants' problems with which the public defender assists. Cannot be political in nature.

Randy Brown: Different needs for different parts of the state; need to have local flexibility.

Sen. Jim Mehlhaff: Doesn't think any of the states are perfect for South Dakota and instead need to pull from each state. Liked Maine's system of running it through contracts.

Brent Kempema: Attorney General's Office usually doesn't get compensation from the county when they help with a case (usually asks county to pay for trial expenses – i.e., paying for an expert witness).

Eric Witcher: How does that work in rural counties?

Brent Kempema: Attorney General's Office assists with the manpower essentially.

Rep. Will Mortenson: South Dakota's court-appointed workforce is private attorneys, and it isn't feasible to do this without them. State dollars mean you start looking at state oversight. Look at existing systems at the circuit level and keep presiding judges in the loop.

Judge Day: Most important part of appointment is the judicial qualification group. Need mandatory continued legal education as it will be hard to force people to get training without it. South Dakota is unique.

Wendy Kloeppner: Asked Greg to talk about Beadle County.

Greg Sattizahn: Beadle County's system has contracts with law firms (co-op of local law firms) and it's self-regulating.

Wendy Kloeppner: Keeps businesses local and engaged.

Randy Brown: In Hughes County, nobody wanted to bid.

Traci Smith: Prosecutors probably won't pick the best indigent defenders.

Wendy Kloeppner: Hard for county commissioners because they usually don't know what they are buying.

Dean Fulton: Make representation effective and efficient for taxpayers. South Dakota has 66 very different counties. Something has got to give—look at structure, case types, examples and offer up a sacrifice.

Wendy Kloeppner: What do we absolutely need to have?

Dean Fulton: Statewide appeals system seems universal.

Dean Fulton: Things for UJS to look into: appeals, habeas, training.

Greg Sattizahn: Appellate and habeas can be handled statewide. Is there consensus around that? Should that office also handle high-level felonies? No scenario where you would want misdemeanors handled by a state office?

Wendy Kloeppner: Good law versus bad law—centralized office would get this same idea. It would get more organized.

Traci Smith: You need an experienced attorney, so this would help with that.

Wendy Kloeppner: Habeas cases are a specialized thing.

Rep. Will Mortenson: Consider grant seeking, assistance to local counsel on request, "inverse

Attorney General's Office."

Brent Kempema: Attorney General's Office has 11-12 criminal and a "ton" of civil attorneys.

Wendy Kloeppner: If there's an appointment, we must make sure that those attorneys can handle it (training). Keep what works.

Eric Witcher: Would like the number of criminal appeals.

Rep. Will Mortenson: Do appellate and habeas cases affect cost on the counties that much?

Brent Kempema: AG has 140 appellate criminal cases (100 of which are direct criminal cases).

Greg Sattizahn: How do we define major felonies? What's the driver? Upon request, opt in or take over?

Eric Witcher: Worries about having people ready to travel and do this work. There is no training available.

Brent Kempema: If the locals can do it let's leave it local, but we share resources and guidance.

Rep. Will Mortenson: Is this affecting charging decisions? Wouldn't want to set up a system that incentivizes anything other than administering justice.

Lori Stanford: Training is important and even the smaller counties are becoming more diverse—cultural training. With court-appointed clients, the trust needs to be established right away.

Wendy Kloeppner: Class 2 and above is a "major felony."

Traci Smith: Likes the opt-in option – you lose lots of attorneys if they can't do appellate cases.

Rep. Will Mortenson: Adding capacity in a similar model to the Attorney General's Office.

Judge Day: Many lawyers don't want to take cases, but you also have lawyers who will take the cases. The judges are looking for the lawyer. Who are these people going to be?

Randy Brown: Major felonies being state run would change funding issues.

Traci Smith: If we take away 1% to 911 and \$30 to LE, how much would go back to the county?

Brent Kempema: LE and 911 need that money.

Traci Smith: They have federal funding and other sources that the public defender's office doesn't have.

Dean Fulton: Major felonies. Something that increases support for private attorneys. Opt-in group of centralized attorneys.

Eric Whitcher: Worried about getting a lawyer who has 10 years of experience and funding it.

Sen. Jim Mehlhaff: Reach out to attorneys but how do you pay for it? Pot fee from counties?

Rep. Will Mortenson: Circuit public defenders—who would manage and do appeals?

Dean Fulton: Appeals, habeas, major felonies.

Greg Sattizahn: Prevailing idea is statewide. Who's assuming the risk of the cost?

Eric Whitcher: Fears a centralized agency won't know how to manage each circuit.

Dean Fulton: Statewide that oversees the relationship? Circuit-based structure?

Eric Whitcher: Each area is so unique, but at least circuits give you a pretty good chance of figuring out what they need.

Rep. Will Mortenson: Overtime, you have a shift from mostly contracted to mostly in-house public defenders.

Traci Smith: What if there is a difference of opinion and if the counties disagree?

Dean Fulton: State umbrella. Circuit based (inhouse or contract)?

Eric Whitcher: No more government structure—just state funding that helps the counties.

Wendy Kloeppner: Need a body to oversee training and set standards.

Eric Whitcher: Agrees with Wendy.

NEXT STEPS:

The next step is for more detailed information—bullet points flushing things out.

Rep. Will Mortenson: Training, commission in the state, what types of cases qualify?

Eric Whitcher: If the state starts funding, then what level of state oversight is there going to be?

ADJOURNMENT:

Dean Fulton adjourned the meeting.